

9:06 am, Jul 26, 2021

U.S. DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

Wendy Gold, . Docket #CV-21-2842 (GRB) (AKT)  
Plaintiff, .  
vs. . United States Courthouse  
Eva Naturals, Inc., . Central Islip, New York  
Defendant. . July 19, 2021  
..... . 10:05 a.m.  
.....

TRANSCRIPT OF PRE-MOTION CONFERENCE  
BEFORE THE HONORABLE GARY R. BROWN  
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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**THE COURT:   Finding                    28**

1                   THE CLERK: Case #2021-2842, Gold vs. Eva Naturals,  
2 Incorporated. Counsel, please state your appearance for the  
3 record.

4                   MR. LIPARI: Good morning, this is Joseph Lipari on  
5 behalf of plaintiff Wendy Gold.

6                   MR. PATHAN: Good morning, this is Mohammad Pathan  
7 on behalf of Eva Naturals, Inc.

8                   THE COURT: Is that everyone?

9                   MR. HARPER: Good morning, Your Honor, Jacob Harper  
10 -- oh, nope. Good morning, Your Honor. Jacob Harper, Davis  
11 Wright Tremaine, on behalf of defendant Eva Naturals.

12                  THE COURT: Okay, anyone else?

13                  MS. DOLGOFF: Hi, yes, Mindy Dolgoff on behalf of  
14 plaintiff Wendy Gold.

15                  MR. BAE: Good morning, Your Honor, Peter Bae of  
16 Davis Wright Tremaine for defendant Eva Naturals.

17                  THE COURT: Anyone else?

18                  ALL: (No verbal response).

19                  THE COURT: All right. Who will be taking the lead  
20 for the defendant this morning?

21                  MR. HARPER: Good morning, Your Honor. I will.  
22 This is Jacob Harper.

23                  THE COURT: Is that H-A-R-P-E-R?

24                  MR. HARPER: It is, exactly right.

25                  THE COURT: All right, Mr. Harper. And who will be

1 taking the lead for the plaintiff?

2 MR. LIPARI: I will, Your Honor. This is Joseph  
3 Lipari, L-I-P-A-R-I.

4 THE COURT: All right, very good. We are here for a  
5 pre-motion conference. At a pre-motion conference, as you  
6 know, anyone can make any motion they want. I don't stop  
7 anyone from making a motion, but I do, as you well know, in my  
8 orders and my rules reserve the right to decide some or all of  
9 the motion. If I think it's appropriate, I will deem the  
10 motion made based on the submissions of counsel and the  
11 arguments you make today, so feel free to argue anything you  
12 want to me. I will say as a preliminary matter that I have  
13 looked over the pre-motion submissions and they are quite good  
14 and quite helpful, so we may resolve some of this on the phone  
15 today, which I think will be helpful. I also note that we're  
16 on the phone because of the continuing of the pandemic, but  
17 hopefully that's drawing to a close and we'll see each other  
18 like real humans again soon. So with that said, Mr. Harper,  
19 would you like to outline the -- or argue the motion to me,  
20 please.

21 MR. HARPER: Yes, Your Honor, thank you. As Your  
22 Honor is aware, this is a -- it's a mislabeling action over a  
23 cosmetic product, or actually it's a whole line of cosmetic  
24 products by our company, Eva Naturals. The plaintiff  
25 purchased one of these 25 products. The product she purchased

1 was called skin firming serum by Eva Naturals, sometime in  
2 January 2021. The plaintiff's claim is pretty  
3 straightforward. She claims that because of the product --  
4 it's not actually the product label, it's because of the  
5 company's brand {quote} "Eva Naturals", she believes the  
6 entire product line is mislabeled because she alleges it  
7 contains what she deems synthetic ingredients.

8 Your Honor, we believe there are three grounds for --  
9 three general grounds to support a motion to dismiss and we  
10 believe those grounds will basically get rid of the entire  
11 case, and if not the entire case, a substantial portion of  
12 those. The first ground which we believe removes the entire  
13 case is the fact that the term Eva Naturals, as is the  
14 defendant's brand, does not support --

15 THE COURT: Yes.

16 MR. HARPER: -- a claim under the New York general  
17 business statute. To support a claim under that statute, as  
18 you know, Your Honor, the plaintiff must make a claim that a  
19 reasonable consumer would be misled by the product. But we  
20 know from the 2nd Circuit as recently as 2020 that in many  
21 circumstances, including this one, the context of the entire  
22 label on which the plaintiff relied or in this case on the 24,  
23 the 25 that the plaintiff did not even read, will support a  
24 motion to dismiss because a plaintiff would not have been  
25 reasonably misled. The case I'm referring to, Your Honor --

1                   THE COURT: Counsel, let me ask you -- counsel,  
2 counsel, counsel, counsel --

3                   MR. HARPER: Sure.

4                   THE COURT: -- counsel, let me ask you a question.

5     How does that differ from the situation in Goldemberg  
6 involving the Aveeno Active Naturals situation?

7                   MR. HARPER: Well, Your Honor, I guess that off the  
8 top of my head I would say it differs in two ways. First, as  
9 to the 24 of the 25 products that the plaintiff did not  
10 purchase, she has no standing to raise any claims as to those  
11 24 --

12                  THE COURT: Different question. Counsel, counsel,  
13 counsel, counsel --

14                  MR. HARPER: Sure.

15                  THE COURT: -- different question, right.

16                  MR. HARPER: Yes.

17                  THE COURT: You just said to me that, you know, that  
18 the whole label has to be taken into context and so forth,  
19 when you were describing that aspect of the case. I  
20 understand your standing issue, and I will get to that, but on  
21 this piece I don't see how Goldemberg is not completely  
22 dispositive of your argument.

23                  MR. HARPER: Well, Your Honor, I guess Goldemberg  
24 was, I believe, two years before the Axon vs. Citrus World  
25 case that the Supreme Court -- or that the 2nd Circuit had

1 addressed. The district court case in the case that -- the  
2 district court in the case that you had just referenced, Your  
3 Honor, did not have the benefit of the 2nd Circuit's decision.  
4 The Goldemberg case from the Southern District in 2014 came  
5 six years before that. In addition, the --

6 THE COURT: Right, but hold on a second, counsel.

7 Let me just ask you --

8 THE COURT: -- the label -- sure.

9 THE COURT: -- when you bring up Citrus World,  
10 Citrus World is a completely different factual set, right? In  
11 other words, Citrus World involves the orange juice. If I  
12 remember correctly, it has the small taint of some pesticide  
13 that was unintentionally there or whatever, or was not  
14 detected. This is different, right? I mean, this is a lot  
15 closer to Goldemberg where you're talking about what's  
16 intentionally in the ingredient within the products. Fair?

17 MR. HARPER: Well, I think that the key problem  
18 resides in the terms. So we have -- in Goldemberg it was much  
19 more -- the Naturals was modified by the term Active, and the  
20 court made -- spent a good amount of time analyzing the effect  
21 of the term Active Naturals on whether a reasonable person  
22 could be misled by the Naturals portion. In fact, the court  
23 noted the Miriam Webster Dictionary definition as to the  
24 active portion saying -- asserting that the thing represented  
25 by the grammatical subject performs the action represented by

1 the verb, marked by a present operation transaction or use, or  
2 capable of being acting or reacting. And so what the  
3 Goldemberg case did was looked at the way the term active  
4 interacted with the term Naturals and found that a -- that  
5 that was the key in -- the key distinction between the {quote}  
6 "Naturals" in Eva Naturals, versus the Naturals in Active  
7 Naturals. I mean, the company in Goldemberg, Johnson &  
8 Johnson, relied on the use of the term Active. I mean, hey,  
9 to activate the term Naturals and the court had concluded that  
10 that in itself was sufficient to get over a motion to dismiss.  
11 We don't have that here. We have Eva which is a -- you know,  
12 it's almost a puffery term that has no similar, I guess,  
13 adverbial relationship to the term Naturals. It's sort of a  
14 neutral term. And that's the problem and that's the main  
15 distinction between Goldemberg, where we've got this activated  
16 Naturals term that is further inducing the -- inducing  
17 consumers to look at Naturals and focus on Naturals and think,  
18 oh, well, we've got active natural ingredients here. They're  
19 going to -- it's going to imply something about the  
20 ingredients, and to draw a relationship between the term  
21 Naturals and the product itself, whereas Eva Naturals is  
22 strictly a puffery type consumer brand name that doesn't -- it  
23 doesn't try to draw in using another term like Active. The  
24 term --

25 THE COURT: Yes, so Mr. Harper, let me just give you

1 -- Mr. Harper, let me just tell you --

2 MR. HARPER: Sure.

3 THE COURT: -- that was a fine argument on the --  
4 you know, on the puffery aspect to this. And you might want  
5 to keep those notes for your jury closing, but I just don't  
6 think that's a motion to dismiss argument, you see.

7 MR. HARPER: Well, again, I think the 2nd Circuit  
8 would disagree, Your Honor, and again, the -- I've said this  
9 before, Goldemberg did not have the benefit of the 2nd  
10 Circuit's guidance. In fact, the plaintiff's letter cites a  
11 number of cases going back -- it looks like the most recent  
12 case is 2018, but the majority of those cases are in the 2010  
13 to 2015 range, before the -- and unless the plaintiff tells us  
14 otherwise, we were not able to find any guidance from the 2nd  
15 Circuit except for the Axon vs. Citrus World case which  
16 strongly suggests to me as someone from the 9th Circuit where  
17 things often don't go our way. When the circuit court gives  
18 us some guidance on the way these reasonable consumer cases  
19 go, we probably should pay attention, and I would suggest,  
20 Your Honor, that that distinction between Active Naturals and  
21 Eva Naturals is not just a jury issue, it's one that the 2nd  
22 Circuit would find is something that a reasonable consumer --  
23 that the reasonable consumer test would filter out, and it is  
24 something appropriate on the motion to dismiss at the Rule 12  
25 stage.

1                   THE COURT: Okay. All right, why don't you tell me  
2 about your next argument.

3                   MR. HARPER: Thank you, Your Honor. The second  
4 argument which I started getting into, Your Honor, was the  
5 lack of standing for the 23 of the 24 products.

6                   THE COURT: Yes.

7                   MR. HARPER: Your Honor, there is no -- you know, a  
8 plaintiff has a right to sue for an injury that the plaintiff  
9 has suffered herself, but she's lumped in a whole line of  
10 products based on her admission that the only product that she  
11 purchased was skin firming serum. That matters, and it  
12 matters particularly at the pleading stage because we have to  
13 know -- well, in order to -- first of all, from Your Honor's  
14 perspective, the court has to be able to conduct the analysis  
15 based on the label on which the plaintiff had relied. And to  
16 unpack that a little bit, I mean, there is no reliance based  
17 on the admissions from the complaint on 23 of the 24 products,  
18 and so there -- the plaintiff does not meet her statutory and,  
19 frankly, Article 1 burden to bring claims there. But even if  
20 we get to the jury stage, Your Honor, we have to know what the  
21 context and what those labels as a whole conveyed to the  
22 plaintiff and to a reasonable person. We just can't do that  
23 based on labels that, you know, as far as we know from the  
24 complaint, the plaintiff has never even seen. We've -- I will  
25 say that in our sort of crazy 9th Circuit, we just -- there is

1 a case addressing this very issue called Lorenzen vs. The  
2 Kroger Company in which the District Court held that a  
3 plaintiff is entitled to bring suit and has standing to bring  
4 suit even in a class action context only as to that product  
5 that the plaintiff had purchased, and is not entitled to bring  
6 claims and therefore a motion to dismiss is appropriate as to  
7 all products that the plaintiff did not purchase. And I raise  
8 that -- it does matter that it's a 9th Circuit -- it's  
9 actually a central district of California case from the 9th  
10 Circuit, but to make that point, the court relied on two U.S.  
11 Supreme Court cases which we cited in our letter. And just  
12 for Your Honor's reference, those cases are -- give me one  
13 second, Your Honor.

14 THE COURT: I was going to say, is --

15 MR. HARPER: Oh --

16 THE COURT: Okay, so there was a new case from the  
17 Supreme Court, the TransUnion case vs. Ramirez on -- that came  
18 out in June this year.

19 MR. HARPER: Yes, there was Your Honor, and --

20 THE COURT: Do you think that changes --

21 MR. HARPER: Yes, Your Honor?

22 THE COURT: Do you think that changes this argument?  
23 In other words, is that (indiscern.).

24 MR. HARPER: No, I mean, I think it changes it only  
25 in that it emphasizes our point. Your Honor, in the

1       TransUnion case, these issues were raised --

2           THE COURT: No, I -- look, counsel --

3           MR. HARPER: Sorry. Go ahead.

4           THE COURT: Make no mistake, counsel, it might help  
5        you, I understand. It's a complicated issue.

6           MR. HARPER: Yes.

7           THE COURT: Until -- you know, I look at my notes  
8        this morning on this, you know, I'd have -- I didn't think  
9        about that. That's something new we're trying to apply in a  
10      variety of circumstances.

11          MR. HARPER: Yes.

12          THE COURT: I don't know how it's going to affect  
13        it. That's really interesting.

14          MR. HARPER: Well, Your Honor, I know we raised it  
15        in another -- in a privacy class action, you know, that case  
16        came up on a Friday and our reply in that -- on our motion to  
17        dismiss in that other case was due on a Monday. We added it  
18        in over the weekend. You know, TransUnion the posture was at  
19        the class certification stage, I believe, but the court's  
20        point applied as a matter of standing, it wasn't strictly as a  
21        matter of class certification. I know the plaintiffs in their  
22        response letter made some reference to the fact that the  
23        standing issues may come up as a class certification issue,  
24        but I don't think that's true in this case. Standing is  
25        standing, and that's an Article 1 issue that is appropriate on

1 a 12(b)(1) motion. I think TransUnion only serves to  
2 emphasize the fact that plaintiff -- well, neither the  
3 plaintiff nor the putative class members may have a class or a  
4 case on their behalf go forward absent an actual injury.

5 THE COURT: Right.

6 MR. HARPER: And I think the way to think about  
7 TransUnion is TransUnion makes that point as to the absent  
8 class members. But what's good for the absent class members  
9 is also good for the -- or particularly good for the putative  
10 class representative. If the class representative doesn't  
11 have standing, they can't represent the class members, and if  
12 class members themselves don't have standing and the putative  
13 class member is a member of that class, and that putative  
14 class -- that putative class representative does not have  
15 standing either. So I think Your Honor is absolutely right to  
16 point out that TransUnion does serve to help us and emphasize  
17 these other two Supreme Court cases that we cited.

18 THE COURT: Again, counsel, help me --

19 MR. HARPER: Your Honor --

20 THE COURT: -- help me just --

21 MR. HARPER: Sure.

22 THE COURT: -- help me just to understand something.  
23 So imagine, and I know coming from the 9th Circuit -- and by  
24 the way there is a transcript being made of this, right, so be  
25 careful.

1                   MR. HARPER: Yes.

2                   THE COURT: But I understand that your home court  
3 sometimes goes a different way. But imagine that the claims  
4 survive here, or some of the -- one or more of the claims  
5 survive here. But you're right about the standing, she has no  
6 standing on the other 24 of 25 products, if I have that number  
7 right. Let's assume that's right.

8                   MR. HARPER: Sure.

9                   THE COURT: If she goes forward and eventually gets  
10 the class certification, I presume the bazillion class members  
11 who join the case will have bought the other 24 of 25, and  
12 then they'd have the right to amend, right? I mean, is this  
13 sort of the game not worth being -- not worth the candle kind  
14 of scenario?

15                  MR. HARPER: No, I don't think so, Your Honor. I  
16 don't think so, Your Honor, because the -- this class member  
17 wouldn't have -- I don't think that -- I guess if I think  
18 about the analysis this way, one reason in a mislabeling  
19 lawsuit we have these standing and reliance requirements is  
20 again the labels matter. And it's not necessarily true and  
21 often provably untrue that one plaintiff's reliance and one  
22 class representative's reliance on a particular label is  
23 consistent or typical or common using class certification  
24 parlance with other members of the class in terms of other  
25 labels that they relied on. So, you know, if Eva Gold -- if

1 Ms. Gold had other putative class members that purchased other  
2 products, then that may be -- you know, then they're free to  
3 add other class representatives that would be able to  
4 represent those other members. I think the point here is  
5 presumptively Ms. Gold can't represent other class members  
6 that purchased these products, nor could she try to fix that  
7 problem by purchasing a whole bunch of products after the fact  
8 because that undermines her reliance argument. So I don't  
9 think it's -- I think it actually is a valuable exercise to  
10 undergo. I mean, among other things, as Your Honor is aware  
11 from these consumer class actions, part of the game is driving  
12 up the discovery costs and sort of turning these at the outset  
13 as broad as possible in trying to leverage the defendant. But  
14 if you sort of bring these down to what really matters, to one  
15 particular plaintiff and the more narrow set of other possible  
16 plaintiffs that she could plausibly represent, then it makes  
17 the case much more grounded in reality and much less of a  
18 speculative leverage game. And so with -- in that sense, I  
19 think it's absolutely worthwhile to go through the exercise of  
20 trying to pare this down to -- well, in our view, paring it  
21 down to a full dismissal, but at a minimum, paring it down to  
22 a set of products that the plaintiff actually has some  
23 standing to represent on a going-forward basis so that if we  
24 need to get rid of this at the motion to dismiss -- or I'm  
25 sorry, at the summary judgment stage or somewhere else that

1     requires a little bit more factual analysis, then we do that  
2     in a more narrow, realistic scope.

3                   THE COURT: Okay. All right, what else would you  
4     like to argue to me today?

5                   MR. HARPER: Last, quickly, third argument is we  
6     don't believe Ms. Gold has standing to assert injunctive  
7     relief. She has stated in -- as we read her complaint as  
8     stating that she will not be purchasing this product anymore  
9     and as Your Honor is aware, when you don't -- when you express  
10    your intent not to purchase a product, then you have no more  
11    standing to bring injunctive relief.

12                  So Your Honor, just to close quickly, I think we believe  
13    -- we intend to move broadly on all of these. We think at  
14    least there is a plausible argument that the entire case goes  
15    away based on the plaintiff's failure to meet the reasonable  
16    consumer standard, at least as alleged in the complaint. If  
17    Your Honor is not going to dismiss the entire case, we think  
18    at a minimum the 23 of the -- Ms. Gold does not have standing  
19    to assert the claims as to 23 of the 24. We may frame that as  
20    a motion to dismiss; we may frame it as a motion to strike  
21    that is coupled with a motion to dismiss, but either way these  
22    claims should be pared down to the one particular item that  
23    she actually purchased --

24                  THE COURT: Okay.

25                  MR. HARPER: -- with the label on which she

1 allegedly relied, and then in any case we don't believe she  
2 has standing to assert injunctive relief. Thank you.

3 THE COURT: All right, thank you. Let me hear from  
4 your adversary. What would you like to address? And feel  
5 free to address anything that came up today or came up in the  
6 filings.

7 MR. LIPARI: Sure, Your Honor. So with respect to  
8 the first argument, I think Your Honor is exactly right, that  
9 Goldemberg is not in any way distinguishable. In fact, it's  
10 right on point. And counsel indicated that there was  
11 apparently some deep-dive analysis, grammatical analysis of  
12 Active Naturals, and what does Active mean, et cetera. But if  
13 we look at the motion to dismiss opinion by Judge Román, it  
14 was fairly simple and fairly straightforward. The court  
15 simply found that notwithstanding the word Naturals being part  
16 of the brand or part of the trademark, and not even  
17 necessarily, you know, something separate and apart from  
18 branding or a trademark, the court could not rule as a matter  
19 of law that no reasonable consumer would be misled. So, I  
20 mean, similarly here, we have Eva Naturals. And I think the  
21 case law is really clear in the 2nd Circuit, and we've cited a  
22 bunch of cases, that a court cannot rule as a matter of law  
23 that a reasonable consumer could not be misled by a Natural  
24 appearing in the brand or the trademark.

25 THE COURT: All right, so Mr. Lipari, let's assume,

1 as you might have guessed, you had me at hello on that, all  
2 right? So we'll move forward from there, yes?

3 MR. LIPARI: Yes. Yes.

4 THE COURT: Okay. Help me with standing, though.

5 How would you use the standing to sue on the 24 of the 25  
6 products that your client didn't buy?

7 MR. LIPARI: So, Your Honor, I think counsel  
8 referred generally to a 9th Circuit case, and counsel referred  
9 generally to what TransUnion might stand for. But Your Honor,  
10 in the 2nd Circuit, the law is fairly clear. If we look, for  
11 instance, at a case called Buonasera vs. Honest, where -- and  
12 this is an SDNY 2016 case. It's 2000 -- I'm sorry, 208  
13 F.Supp.3d 555. And in that particular case, plaintiff in this  
14 putative class action sued as a class action plaintiff as a  
15 result of purchasing one of the shampoos or the skin creams,  
16 but then there was a whole product portfolio that he had not  
17 purchased. And in that particular case, Your Honor, it was  
18 dealt with as follows: the court indicated that a plaintiff  
19 has standing to bring suit for products not purchased if she  
20 personally suffered injury as a result of defendant's conduct  
21 and such conduct implicates the same set of concerns as the  
22 conduct alleged to have caused injury to other members of the  
23 putative class. So here, Your Honor --

24 THE COURT: Counsel, Mr. Lipari, have you read --  
25 Mr. Lipari, have you read the TransUnion decision we were just

1 talking about?

2 MR. LIPARI: I have, Your Honor.

3 THE COURT: And what do you think, did that change  
4 that analysis, or might that change that analysis?

5 MR. LIPARI: Your Honor, I mean, it would really  
6 have to be developed because -- you know, through subsequent  
7 case law. Because at this point, from our --

8 THE COURT: Mr. Lipari, Mr. Lipari, I'm smiling only  
9 because we're not in person. I just want to say to you, I  
10 wonder who has to do that? Oh, right, that's what they pay me  
11 for, I've got to figure out what do we do now.

12 MR. LIPARI: Right. Your Honor, exactly. My point,  
13 Your Honor, is having read the TransUnion case, it seems  
14 completely distinguishable and inapposite. And there what we  
15 were talking about was whether or not in a data breach case  
16 there was a concrete injury when a consumer's data, you know,  
17 was breached and was vulnerable and was susceptible to being,  
18 you know, distributed or disseminated, but there was no actual  
19 concrete harm, and assessing standing from that perspective.  
20 Here on the other hand we unquestionably have a situation  
21 where Ms. Gold, you know, we allege, was deceived as a result  
22 of the on-label misrepresentation. So there was  
23 unquestionably a concrete harm in the sense that she was  
24 induced to purchase a product based upon misrepresentations  
25 and she paid money for a product that she otherwise wouldn't

1 have purchased. So, I mean, I just look at that standing  
2 issue as very distinguishable from the issue in TransUnion  
3 where we're talking about -- which is sort of, as Your Honor  
4 may know, I think the precursor to that was Spokeo, the Spokeo  
5 case, and essentially whether just sort of like this, you  
6 know, kind of injury in theory but not an actual concrete harm  
7 confer the standing on a plaintiff. So I really just don't  
8 look at the TransUnion case as on point, and frankly I don't  
9 even look at it as helpful in this analysis.

10 THE COURT: Well, maybe you're right, maybe you're  
11 wrong, I don't know. I have grave misgivings on that  
12 particular point. But let me go on to a few other things I  
13 need you to address, please, if I may. Counsel didn't raise  
14 this, but the territoriality requirement. Are you looking to  
15 certify a class beyond the borders of New York State, and if  
16 so, what basis do you have to do so?

17 MR. LIPARI: Your Honor, yes, we would want to  
18 certify a subclass of -- it's a New York subclass only with  
19 respect to those GBL claims. So we would concede at this  
20 point that, you know, if they were not New York residents or  
21 they didn't view or purchase the products in New York, then at  
22 least, the way we're framing our complaint, the GBL would be  
23 inapplicable in that situation. So that's why it would be a  
24 New York only subclass for the GBL claims.

25 THE COURT: Okay. But on the -- you think on the

1 express warranty you can go beyond the state boundaries, yes?

2 MR. LIPARI: We do, Your Honor.

3 THE COURT: Okay. That's only troubling from a case  
4 management standpoint. I don't know that you're legally  
5 incorrect but, you know, it injures sort of the scope of what  
6 we're going to do here (indiscern.) --

7 MR. LIPARI: Well, Your Honor -- oh, I'm sorry to  
8 cut you off, Your Honor, I --

9 THE COURT: No, no, no, no, you didn't.

10 MR. LIPARI: -- it's just difficult on the phone. I  
11 was simply going to say, Your Honor, you know, respectfully,  
12 we don't view that as a motion to dismiss a 12(b) (6) issue, we  
13 view that, as I think Your Honor was alluding to, as a case  
14 management issue at the certification phase.

15 THE COURT: Aptly fair. Is counsel correct that if  
16 your GBL 349 and 350 claims go forward then I should dismiss  
17 the unjust enrichment as duplicative? And I think I know the  
18 answer, but I'll give you a chance to persuade me otherwise.

19 MR. LIPARI: Sure. So Your Honor, we would make two  
20 points on that. The first is we would be entitled, at least  
21 at this stage, to go forward with that claim in the  
22 alternative. But, you know, I suppose then in the event that  
23 there's no need for alternative pleading because then the GBL  
24 claims do in fact go forward, then our argument in that  
25 respect would be these are different claims that have

1 different factors associated with those claims. So, you know,  
2 an unjust enrichment claim --

3 THE COURT: Okay.

4 MR. LIPARI: Oh, okay.

5 THE COURT: I hear you, I hear you. I was just  
6 going to say, the Goldemberg case that you would have me to  
7 adhere to carefully did dismiss the express warranty claims,  
8 fair?

9 MR. LIPARI: It did, Your Honor, 100%.

10 THE COURT: Yes, okay. I think I know what to do  
11 there. All right, are we agreed on the injunctive relief  
12 piece or do you read those 2nd Circuit cases somehow  
13 differently here?

14 MR. LIPARI: Your Honor, we would be willing to  
15 withdraw that portion of our complaint with respect to Ms.  
16 Gold seeking injunctive relief, you know, in view of that  
17 Birney case.

18 THE COURT: That application is granted. We're  
19 making progress already. The injunctive relief portion is  
20 withdrawn. Please note that. All right, good. And then  
21 there's standing I think we spoke about. Anything else you  
22 want to address with me today?

23 MR. HARPER: Is this for both of us, Your Honor, or  
24 just for the (indiscern.)?

25 THE COURT: Well, let me tell -- let me see if Mr.

1 Lipari is done and Mr. Harper, I'll let you respond in a  
2 moment.

3 MR. HARPER: Okay.

4 THE COURT: So Mr. Lipari, anything else?

5 MR. LIPARI: Your Honor, bear with me one moment,  
6 I'm just flipping through my notes.

7 THE COURT: Take your time. You've done a  
8 delightful job so far, so please -- everyone has, so please  
9 continue.

10 MR. LIPARI: Okay, Your Honor, yes, I thought -- I  
11 just wanted to clarify something. So Your Honor was asking me  
12 a question about unjust enrichment and whether or not the  
13 Goldemberg court dismissed -- well, I thought Your Honor was  
14 asking me if the Goldemberg court dismissed the unjust  
15 enrichment cause of action, so that's why I answered in the  
16 affirmative, because I believe they did. However, I'm looking  
17 at the case with Goldemberg. They kept the breach of express  
18 warranty claim, because I think Your Honor actually asked me -  
19 -

20 THE COURT: Oh, yes.

21 MR. LIPARI: -- about the breach of express warranty  
22 claim.

23 THE COURT: Yes, but not in that context. I was  
24 just talking about the unjust enrichment being duplicative,  
25 but yes, thank you. I think I'm good on that part.

1                   MR. LIPARI: Okay, sure. Yes.

2                   THE COURT: Anything else?

3                   MR. LIPARI: I have nothing further then, Your  
4 Honor. No, no, Your Honor.

5                   THE COURT: All right, great job, Mr. Lipari. Mr.  
6 Harper, anything else you want to respond to?

7                   MR. HARPER: Yes, Your Honor, just very, very  
8 quickly. On the point about --

9                   THE COURT: Take -- no, Mr. -- wait, Mr. Harper,  
10 hold on. Mr. Harper, take your time.

11                  MR. HARPER: Sure.

12                  THE COURT: And not rush. Go ahead.

13                  MR. HARPER: Okay. I'll still be quick to save  
14 everyone some time. I do want to remind Your Honor, as you  
15 are aware, that the 2nd Circuit has held that it is {quote}  
16 "well settled that a court may determine as a matter of law  
17 that an allegedly deceptive advertisement or business practice  
18 would not have misled a reasonable consumer" {end quote}. And  
19 that's Fink vs. Time Warner 714 F.3d 739.

20                  THE COURT: Got it.

21                  MR. HARPER: I -- just putting that out there as a  
22 friendly reminder that this is a subject that is viable for a  
23 motion to dismiss, at least as a procedural matter.

24                  THE COURT: Good.

25                  MR. HARPER: On the TransUnion and standing issue as

1 to the other 23 or 24 products, we were referencing --  
2 opposing counsel noted that we had mentioned 9th Circuit  
3 cases, but I -- the cases, again, were relying on U.S. Supreme  
4 Court precedent. As we noted in our briefing, the two cases  
5 that apply including to the 2nd Circuit are Blum vs. Yaretsky,  
6 457 U.S. 991, and the pin cite is at 999. That's a 1982 case.  
7 In the context of a -- in a class action, the Supreme Court  
8 noted that {quote} "it is not enough that the conduct of which  
9 the plaintiff complains will injure someone" {end quote}.  
10 Another quote, "nor does the plaintiff who has been subject to  
11 injurious conduct of one kind possess by virtue of that injury  
12 the necessary stake in litigating conduct of another kind,  
13 although similar, to which he has not been subject" {end  
14 quote}. Your Honor, we believe here, as it did in the  
15 Lorenzen case that we noted earlier, that plaintiff's attempt  
16 to use standing for one product to stand in as a class  
17 representative on behalf of purchasers of 23 separate and  
18 different products violates Blum and violates the standing  
19 requirements under Article 1. The other case that would apply  
20 here is called Lewis vs. Casey, 518 U.S. 343, and that case  
21 states {quote} "that a suit may be a class action, ... adds  
22 nothing to the question of standing, for even named plaintiffs  
23 who represent a class 'must allege and show that they have  
24 personally been injured, not that the injury has been suffered  
25 by other, unidentified members of the class to which they

1 belong and which they purport to represent.'" {end quote}.

2 Your Honor, with those two cases in mind, it seems TransUnion

3 doesn't change anything. As Your Honor suggested, it actually

4 helps sort of define it further and gives further ammunition

5 to the fact that Ms. Gold's possible standing to assert claims

6 for one product is not for standing over others. There are

7 additional case management issues that would apply in the

8 class context but from our perspective she does not even have

9 standing in the first instant to raise claims there and that's

10 something appropriate for a motion to dismiss. Your Honor, I

11 do support Your Honor's reference of the extraterritoriality

12 issues which we raised in the letter, but -- and we would

13 raise those issues in the motion to dismiss depending on the

14 scope of -- it sounds like the plaintiff may be narrowing the

15 complaint at least somewhat with respect to injunctive relief

16 and we would --

17 THE COURT: Well, so wait, let me ask a question,

18 counsel.

19 MR. HARPER: Sure.

20 THE COURT: On the express warranty claim, is there

21 a basis to say at this juncture that the class must be limited

22 to the state boundaries?

23 MR. HARPER: I believe there is, but Your Honor, I

24 can't say off the top of my head that I've researched that

25 particular issue in a lot of detail.

1                   THE COURT: Okay.

2                   MR. HARPER: I believe that it would be. I believe  
3                   that express warranty claims would be a terminus with the 350  
4                   claims, but --

5                   THE COURT: Okay.

6                   MR. HARPER: -- it's something I would need to  
7                   consider a little bit more.

8                   THE COURT: Okay, very good. All right, I am going  
9                   to rule in part today, so let me go ahead and set that on the  
10                   record. And there is a -- we're making a recording of this  
11                   and may need to transcribe. It will be available. So as set  
12                   forth in rule 2(e)(1) of my individual rules, the Court  
13                   reserves the discretion to construe the pre-motion letters  
14                   along with counsel's arguments as the motion itself. As noted  
15                   in that rule, this procedure has been upheld by the 2nd  
16                   Circuit under appropriate circumstances. The exercise at such  
17                   discretion is rendered more appropriate by the existence of  
18                   the individual rule and the orders that I've issued putting  
19                   counsel on notice of it, which effectively put counsel on  
20                   notice of the possibility that I would rule today. This  
21                   motion that is to dismiss, I'm going to deem the motion made  
22                   in part, and I'll explain as I go along. But the motion to  
23                   dismiss is decided under the well-established standards of  
24                   review for such matters as discussed in many cases, but I'll  
25                   cite one, Burris vs. Nassau County District Attorney, 2017

1 Westlaw 9485714 at \*3 to 4, which I'm incorporating herein by  
2 reference solely for the purpose of establishing the well  
3 known standards for a motion to dismiss. But as counsel well  
4 knows, the Court is required to decide, assuming the  
5 allegations to be true for the purposes of the motion only,  
6 whether there are sufficient facts to determine whether  
7 plaintiff has alleged a plausible claim or plausible claims on  
8 their face. Based on review of the complaint and after  
9 considering the arguments of counsel, I find that the  
10 complaint does, in part, state sufficient fact to state  
11 plausible claims, and in other parts I find it insufficient,  
12 and I'll set those out.

13 So we'll begin at the beginning. I believe that there is  
14 sufficient factual information on the general business law New  
15 York State §349 deceptive practice claim. Assuming the facts  
16 to be true, I do find that claim plausible. And we had a lot  
17 of discussion about this, but I'll just point out that once  
18 again I find the Goldemberg case, which is at 8 F.Supp 3d.  
19 467, on all fours and quite helpful, and that was the Aveeno  
20 Active Naturals case and I believe very analogous to the case  
21 at bar, and in that case the court denied a motion to dismiss  
22 the 349 claim.

23 Now defendants point me to the Axon vs. Citrus World  
24 case, which is at 354 F.3d 170. Now while that's helpful to a  
25 degree, I would note that the very first proposition set forth

1 by the court is as follows, and I'm going to quote the case  
2 here. It's {quote}, "We agree with the district court that  
3 the presence of glyphosate", G-L-Y-P-H-O-S-A-T-E, "as a  
4 contaminant in defendant's product, rather than an  
5 intentionally-added ingredient, bolsters the conclusion that a  
6 reasonable consumer, viewing the brand name Florida Naturals -  
7 - or Florida's Natural", sorry, "would not make assumptions  
8 regarding the presence or absence of a trace amount of  
9 glyphosate", and that's at Axon 354 F.Supp.3d at 183. Now I  
10 would add that defendant has pointed out to me that it may  
11 well be within the court's discretion to make the  
12 determination as to whether or not a consumer would be  
13 defrauded on its face. To the extent that it is within my  
14 discretion, I decline to exercise that discretion at this  
15 time. It's in light of the teachings of Goldemberg and I  
16 believe the distinguishing factors of Axon. So the 349 claim  
17 will go forward.

18 I also find that there is a sufficient basis on the 350  
19 claim and so that one will go, a false advertising claim under  
20 New York State general business law as well, and there I just  
21 point the parties, just because it's slightly helpful, to  
22 Silva vs. Smucker Natural Foods which is at 2015 Westlaw  
23 5360022, which was the Natural Brew Root Beer case. So I  
24 believe with regard to -- and everything I just said applies  
25 to the one product the plaintiff purchased. We'll come back

1 to the rest in a moment. And then we've already agreed that  
2 the class to the extent there may be a class will be limited  
3 to New York state as to those two claims, so that's no longer  
4 an issue. And then the unjust enrichment claim I also find is  
5 duplicative and should be dismissed. And I'll once again cite  
6 the Goldemberg case which did exactly that. So I'm going to  
7 dismiss unjust enrichment. Plaintiff's counsel had kindly  
8 withdrawn the injunctive relief question. Thank you for that,  
9 that makes it quite a lot easier to go forward because there's  
10 lots and lots of new precedents regarding that issue, and I  
11 think Plaintiff was -- Plaintiff's counsel was correct in  
12 doing so.

13 That leaves me with the issue of standing. So that's my  
14 ruling on the motion to dismiss up to this point. On  
15 standing, this is a very complex question which I find has  
16 been further complicated by the advent of the TransUnion case.  
17 I've been trying to figure out exactly how that would apply  
18 and how that's going to work in this context. I need some  
19 more help, so I'm going to ask the parties to brief only that  
20 issue now that I've decided everything else, I believe, but  
21 I'm going to ask you to brief this standing issue. I think a  
22 relatively brief brief -- I did say that word twice, that's  
23 not an error -- would be helpful. I'm thinking something on  
24 the order of ten pages, but counsel could persuade me  
25 otherwise, because I will note that it is a complex issue.

1     What do you say about that? Tell me what you think about that  
2     page limit and tell me when you can get those briefs in.

3                    MR. LIPARI: Your Honor, I'm sorry, can you repeat  
4     the page limit?

5                    THE COURT: I was saying ten.

6                    MR. LIPARI: Ten works for plaintiff, Your Honor.

7     And if we could do two weeks.

8                    THE COURT: How about defendant?

9                    MR. HARPER: I think we can do ten. Is Your Honor  
10   envisioning cross briefing or how does Your Honor believe we  
11   should be doing it?

12                  THE COURT: I mean, I -- you know what, look, in  
13   light of the newly developed case law, I guess we should do it  
14   that way. So let me ask you, then, when can you get your  
15   moving brief in on the standing issue? And of course, I'm  
16   talking about standing on the 25 -- 24 products not purchased  
17   by plaintiff.

18                  MR. HARPER: Sure. Your Honor, I would -- let's  
19   see. I'm just looking at my calendar. The -- two weeks puts  
20   us at the first week of August, and next week is pretty busy.  
21   Would you mind if we do it three weeks to August 9th, Your  
22   Honor?

23                  THE COURT: Counsel, we just got through a pandemic,  
24   so I'm feeling very generous, so yes, absolutely. August 9th  
25   is terrific, okay?

1                   MR. HARPER: All right.

2                   THE COURT: And let me ask plaintiff's counsel, how  
3 long would you like to respond to that? When do you want to  
4 respond to that by?

5                   MR. LIPARI: Okay, bear with me one moment, Your  
6 Honor. I'm just looking at my calendar.

7                   THE COURT: And make it convenient, please. I don't  
8 want to put you in a hard spot.

9                   MR. LIPARI: August 30th, Your Honor?

10                  THE COURT: August 30th would be fine, and a week  
11 thereafter if they wish, defendant may write me a very brief  
12 letter in reply, but make it very, like three pages or less,  
13 all right?

14                  MR. HARPER: Thank you, Your Honor.

15                  THE COURT: All right. And so this way -- and I  
16 will ask you to follow the bundling rule, so just send that to  
17 each other and then get it to me in September, and I will turn  
18 to this very interesting issue. But before I let you go and  
19 while we're all together, first of all let me make sure, is  
20 there anything I didn't resolve based on the anticipated  
21 motions and so forth, other than obviously the standing piece?

22                  MR. HARPER: I don't believe so, Your Honor. Not  
23 from our perspective.

24                  THE COURT: Okay. And I'll ask this, and both of  
25 you, and plaintiff, you can answer, anything -- is there

1 anything else we need to do today while we're together?

2 MR. LIPARI: Not from plaintiff's perspective, Your  
3 Honor. Thank you.

4 THE COURT: Okay, and defendant, anything else?

5 MR. HARPER: No, Your Honor. No, Your Honor.

6 THE COURT: All right, counsel, let me say, I meant  
7 what I said, you both did a fine job today. These are  
8 complicated issues and you helped make them simple and I'm  
9 grateful for that. So I look forward to your poignant briefs  
10 that shall follow in September and we'll get to this other  
11 very interesting issue in the case. All right, have a nice  
12 day.

13 MR. HARPER: Thank you, Your Honor, appreciate it.

14 MR. LIPARI: Thank you very much.

15 THE COURT: All right, we're adjourned. Take care.

16 (Court adjourned)

17

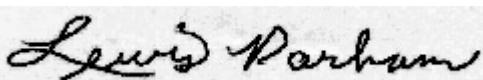
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CERTIFICATION

19 I certify that the foregoing is a correct transcript from the  
20 electronic sound recording of the proceedings in the above-  
21 entitled matter.

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7/23/21

\_\_\_\_\_  
Signature of Transcriber

\_\_\_\_\_  
Date